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No. 88-468

In The

Supreme Court of the United States

October Term, 1988

In re:

RICHARD CHARLTON,

Petitioner,

v.

ENTERPRISE LEASING CORPORATION,
a California corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The petition fails to accurately describe the procedural history of this appeal. Petitioner appealed to the Ninth Circuit Court of Appeals from an order of the District Court of Arizona affirming an order of the Bankruptcy Court which denied petitioner's motion for summary judgment. (App. A-1) Petitioner has never appealed an order granting a motion for summary judgment brought by respondent.

STATEMENT OF THE CASE

The essential facts while not disputed are not fully disclosed in the petition. Petitioner, Richard Charlton borrowed $125,000.00 from Western Savings and Loan Association (Western Savings) in 1976. As security for the loan Mr. Charlton executed a deed of trust on residential property he owned in Phoenix, Arizona. Western Savings was the beneficiary of that deed of trust. The loan went into default resulting in a recordation of a notice of trustee's sale on March 15, 1979. The trustee's sale was to occur on June 14, 1979. Mr. Charlton filed his petition under Chapter 11 of the Bankruptcy Act on May 7, 1979. The bankruptcy stay prevented the noticed sale from occurring.

By the time Mr. Charlton filed his bankruptcy petition there were numerous other encumbrances and judgment liens on the property. Respondent, Enterprise Leasing Corporation (Enterprise), was the beneficiary of a deed of trust on the property subordinate to the interest of Western Savings.

On August 1, 1979, Western Savings filed a complaint in the bankruptcy court seeking a modification of the stay to permit the trustee's sale to be conducted. Mr. Charlton answered that complaint. In October 1979 Mr. Charlton and Western Savings entered into a written settlement which was filed with the bankruptcy court. The settlement proposed entry of a judgment by the bankruptcy court modifying the stay to permit all parties who had an interest in the property to enforce those interests and to permit Mr. Charlton to reinstate the deed of trust. However, the settlement would not permit any creditor to

seize or sell the property until May 1, 1980. The bankruptcy court approved the settlement and executed a judgment modifying the stay effective upon entry of the judgment, December 10, 1979 (App. A-7).

The trustee's sale was continued to May 1, 1980 by the trustee. On April 30, 1980, Western Savings assigned to Enterprise its beneficial interest in the deed of trust. A new trustee was appointed by Enterprise and the trustee's sale was conducted on the following day May 1, 1980 for the amount due on the loan.

Enterprise is a creditor in the Charlton bankruptcy as a result of the lease of restaurant equipment to Mr. Charlton. In January 1981, Enterprise filed a complaint in the Charlton bankruptcy to establish the nature and amount of its bankruptcy claim. The matter was tried in September 1985. Less than a week prior to trial[1] Mr. Charlton filed a motion for summary judgment where he, for the first time, raised the issue which he brings before this court. In his motion Mr. Charlton sought an order voiding the trustee's sale which had occurred over five years earlier. The bankruptcy court denied the motion. Both the district court and the court of appeals affirmed.

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[1] The Chapter 11 had been converted to a Chapter 7 liquidation on December 1, 1983. The bankruptcy trustee represented the estate at trial.

ARGUMENT

THE TRUSTEE'S SALE WAS CONDUCTED IN COMPLIANCE WITH STATE AND FEDERAL LAW

The sole issue raised in the petition is whether the bankruptcy stay stopped the passage of time. Although not articulated in the petition, Mr. Charlton's argument at every prior level has been that the trustee's sale was invalid because there was not sufficient time between the date of the notice of the sale and the date the sale occurred during which the bankruptcy stay was not in effect. Mr. Charlton claims that both federal and state law require a period of at least ninety days preceding the trustee's sale during which there is no bankruptcy stay in effect.

The Arizona Deed of Trust Statute, Arizona Revised Statutes Section 33-801, et seq., provides a means to expeditiously foreclose a security interest in real property, *Le Desma v. Pioneer National Title Insurance Company*, 129 Ariz. 171, 629 P.2d 1007 (App. 1981). Once a default occurs in the contract which a deed of trust secures, the appointed trustee may sell the trust property, A.R.S. Section 33-807 (A). The trustee must record a notice of sale, A.R.S. Section 33-808. The sale cannot occur until ninety days have passed from the date of recordation of the sale, A.R.S. Section 33-807 (C). The purpose of the ninety day waiting period is to permit reinstatement[2] of the deed of

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[2] Petitioner refers to the right of redemption (Pet. 7) which is materially different than reinstatement of a deed of trust. A

trust prior to the date of sale, A.R.S. Section 33-813 (A). The sale could occur any time after the ninety day period. The trustee may continue the sale, A.R.S. Section 33-810 (B).

Mr. Charlton's argument is unpersuasive for two reasons. Mr. Charlton fails to recognize that the bankruptcy court lifted the stay on December 10, 1979, not April 30, 1980 as he claims (Pet. p.3). Over one hundred forty days passed from the date on which the stay was lifted and the date of the sale. Therefore, if the argument that the stay tolls the ninety day reinstatement period is legally correct, the facts demonstrate full compliance.

Mr. Charlton's tolling argument, however, has no basis in law. The purpose of the deed of trust statute is to permit a party at least ninety days to cure the default in a contract by making back payments. Mr. Charlton had almost fourteen months to reinstate the deed of trust before the property was sold. The bankruptcy stay does not affect these types of waiting periods, *In Re Pridham*, 31 B.R. 497 (Bankr. S.D. Cal. 1983). Since a trustee's sale

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trustor under a deed of trust has until the day prior to a trustee's sale in which to reinstate. To reinstate the deed of trust the trustor only pays the amount in default, A.R.S. Section 33-813 (A). A property owner cannot lose his interest in the property until a trustee's sale actually occurs.

The right of redemption in Arizona is also statutory and requires payment in full of a judgment, foreclosing a mortgage, and the full amount remaining unpaid on the underlying contract. A judgment debtor has until six months following the entry of judgment to redeem. The right to redeem is extinguished merely by the passage of time, A.R.S. Section 12-1282.

cannot be conducted during the pendency of the bankruptcy stay, the debtor and his estate are fully protected from a loss of estate property until the court modifies the stay. A stay modification can occur after stipulation or a trial on a complaint seeking relief from the stay, Former Bankruptcy Rule 601 (c).

The bankruptcy court modified the stay concerning Mr. Charlton's property without a trial because he had consented to lifting the stay and agreed on the date after which the property could be sold if reinstatement of the deed of trust had not occurred. Although he claims a violation of his due process rights, Mr. Charlton fails to discuss how his rights were not fully protected.

CONCLUSION

Mr. Charlton's argument has never had any legal or factual basis. The bankruptcy court had no option but to deny his motion for summary judgment.

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor.	In Chapter 7 Proceeding NO. B-79-890-PHX-LO
ENTERPRISE LEASING CORPORATION, a california corporation, Plaintiff, vs. RICHARD CHARLTON, Defendant.	ADVERSARY "M" RGM OPINION AND ORDER (Filed May 20, 1986)

On September 12, 1985, the defendant, Richard Charlton ("Charlton") filed a Motion for Summary Judgment against the plaintiff, Enterprise Leasing Corporation ("Enterprise"). In the motion, Charlton claims that the foreclosure sale of his former home, located at 5642 East Rockridge, Phoenix, Arizona, hereafter referred to as "Rockridge", was technically defective according to Arizona foreclosure law, A.R.S. §33-801 *et seq.* Specifically Charlton asserts that the foreclosure sale was not noticed pursuant to the requirements of A.R.S. §33-807(c).

On September 19, 1985, the subsequent purchaser and current holder in fee of the Rockridge property, San Angelo & Co., Ltd., ("San Angelo"), filed a response to this Motion for Summary Judgment. San Angelo argues that this Court has previously heard Charlton's argument that a technical defect in the foreclosure sale process should act to set aside the sale, and that this Court

dismissed that argument pursuant to a Motion for Summary Judgment filed by Charlton against San Angelo in a related counterclaim. San Angelo requests an award of attorneys' fees for the cost of responding to this motion.

On December 16, 1985, Enterprise filed a response to this Motion for Summary Judgment. Like San Angelo, Enterprise argues that the premise of Charlton's Motion for Summary Judgment has been previously heard and disposed of by this Court. Additionally, Enterprise denies that any technical violation of the state noticing statute, A.R.S. §33-807(c), occurred.

Enterprise cites the December 10, 1979, Order to Modify Stay issued by Judge Vincent Maggiore (attached) that allowed the creditor, then Western Savings, to notice a foreclosure sale of the Rockridge property. Pursuant to that order, the stay was further modified to allow the actual sale of the Rockridge property at any time after April 30, 1980.

Enterprise argues that the passage of time between the notice of sale issued in December of 1979 and the actual sale of the Rockridge property in May of 1980 more than meets the ninety (90) day notice requirement of A.R.S. §33-807(c). Enterprise also asks the Court for an award of attorneys' fees for the cost of responding to this Motion for Summary Judgment.

On May 12, 1986, at a properly noticed hearing, oral argument on this motion was heard and the matter taken under advisement.

In disposing of this latest Motion for Summary Judgment filed by Charlton in this adversary proceeding, the

Court considers two points worthy of discussion in this Order.

First, modifying or lifting the stay pursuant to 11 U.S.C. §362(a) is not a rigid and inflexible procedure. The language of 11 U.S.C. §362(d) plainly states, "On request of a party in interest . . . the court shall grant relief from the stay . . . *such as* by terminating, annulling, modifying *or* conditioning such stay –" By using the language "such as" and the disjunctive "or", Congress intended that the court alter the stay to meet the needs of the specific situation on a case by case basis.

Judge Vincent Maggiore, of this Court, effectively modified any stay with respect to the Rockridge property, by order dated December 10, 1979. This Court expressly concludes that consistent with the December 10, 1979, order of Judge Maggiore, the stay was modified to allow the first position lien holder to notice a foreclosure sale after December 10, 1979 and then, conduct a foreclosure sale after April 30, 1980.

This Court finds that the first position lien holder foreclosed on the Rockridge property consistent with the terms of the stay modification order and that the provisions of the modification did not violate the provisions of the Arizona foreclosure law, A.R.S. §33-801 *et seq.* Accordingly, this Court finds and concludes that the stay was modified by order of the Bankruptcy Court and the secured interest thereupon foreclosed.

The second point the Court wishes to bring to the attention of the parties concerns the merit of the argument raised by Charlton, that technical defects in the

foreclosure sale should act to set aside the sale of the Rockridge property.

The Court recognizes, and Enterprise and San Angelo correctly point out, that this particular argument was raised by Charlton in his Motion for Summary Judgment filed against San Angelo in a related counterclaim. Having considered the record on these pleadings, this Court denies granting of the summary judgment in favor of Charlton based on this renewed argument for the same reasons it denied Charlton's Motion for Summary Judgment against San Angelo.

By order dated May 24, 1985, this Court expressly discussed the effects of the alleged impropriety raised by Charlton with his argument that, the notice requirement of A.R.S. §33-807(c) was not met and title to the Rockridge property should be returned to the debtor. At that time, this Court directed the parties to the language of A.R.S. §33-811(A). That statute states:

> The purchaser at the sale, other than the beneficiary to the extent of his credit bid, shall immediately pay the price bid. Upon receipt of payment, in form satisfactory to the trustee, the trustee shall execute and deliver his deed to the purchaser. *The trustee's deed shall raise the presumption of compliance with the requirements of this chapter* relating to the exercise of the power of sale and the sale of the trust property, *including recording, mailing, publishing and posting of notice of sale and the conduct of sale. Such deed shall constitute conclusive evidence of the meeting of such requirements in favor of purchasers* or encumbrances *for value and without actual notice.* Knowledge of the trustee shall not be imputed to the beneficiary. (Emphasis added.) A.R.S. §33-811(A).

Having failed to raise any new issues or argument, this Court does not find that Charlton has overcome the statutory presumption in favor of vesting title in San Angelo. This Court cannot, based on this argument, divest title to the Rockridge property, properly held by San Angelo.

Based upon the foregoing, this Court holds and determines accordingly,

IT IS ORDERED denying the Motion for Summary Judgment filed by the defendant, Richard Charlton, against the plaintiff, Enterprise Leasing Corporation.

IT IS FURTHER ORDERED denying the motions by the parties, Enterprise and San Angelo, for the award of attorneys' fees incurred in responding to this motion under the record presented.

IT IS FURTHER ORDERED denying the motion of Enterprise for sanctions against Charlton for filing this Motion for Summary Judgment on the record presented.

DATED this 20th day of May, 1986.

/s/ (Illegible)
ROBERT G. MOOREMAN
Chief U.S. Bankruptcy Judge

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(Filed Dec. 10, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor.	In Proceedings For An Arrangement Under Chapter XI
WESTERN SAVINGS AND LOAN ASSOCIATION, an Arizona corporation, Plaintiff, vs. RICHARD CHARLTON, Debtor, Defendant.	No. B-79-890-PHX-VM JUDGMENT AND ORDER APPROVING AND CONFIRMING SETTLEMENT BETWEEN THE DEBTOR AND DEBTOR-IN-POSSESSION RICHARD CHARLTON AND WESTERN SAVINGS WITH RESPECT TO WESTERN SAVINGS COMPLAINT FOR RELIEF FROM STAY

With respect to resolution of the above-captioned adversary proceeding ("F") it appears to this Court that an Agreement entitled "Settlement of Western Savings Complaint For Relief From Stay" has been entered into by and among Western Savings and Loan Association and Richard Charlton, Debtor and Debtor-In-Possession. A true and exact copy of said Agreement is attached hereto as Appendix "1" to this Judgment and Order.

This Court finds and concludes as follows:

a. The Agreement has been approved in writing by the Defendant and Debtor Richard Charlton, as well as Western Savings;

b. Separate and independent from the Settlement among the litigants in the adversary proceeding, the Court is satisfied that the Agreement and this Judgment and Order provide a reasonable and expeditious resolution of the above-captioned adversary proceeding and that the Agreement is in the best interests of the Debtor and the unsecured creditors of this estate;

c. This Agreement has been noticed to all creditors and heard by this Court;

NOW, THEREFORE, based upon the foregoing reasons and good cause appearing,

IT IS ORDERED as follows:

1. The Agreement attached hereto as Appendix "1" shall be, and hereby is, approved and confirmed by this Court according to its terms and is hereby incorporated as though fully set forth herein.

2. Any stay or injunction against lien enforcement of any kind, existing now or in a conversion to any other bankruptcy proceeding shall be and hereby is modified as provided in the Agreement so that all creditors may proceed from the entry date of this Judgment and Order to notice trustee's sales or otherwise act procedurally to enforce their interests in the Rockridge Property described in the attached Agreement; *however*, no creditor, individual, or other entity may take, seize, retain, sell, or otherwise dispose of the property or extinguish any

interest of other creditors or the Debtor by any process or proceeding until May 1, 1980.

3. This Court retains all jurisdiction necessary to effectuate the attached Agreement and to carry out a sale of the afore-described Rockridge Property free and clear of liens through this Chapter XI proceeding or in any superseding bankruptcy proceeding.

4. The above-captioned adversary proceeding on Western Savings and Loan's Complaint for Relief From Stay is hereby dismissed without prejudice.

DATED, this 10 day of December, 1979.

/s/ Vincent D. Maggiore
United States Bankruptcy Judge